

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-143

COMMONWEALTH

vs.

SIMON M. MWANGI.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Simon M. Mwangi, appeals from his conviction, after a District Court jury trial, of assault and battery, G. L. c. 265, § 13A (a). We conclude that the Commonwealth had a good faith basis for its cross-examination of the defendant and did not elicit negative responses with the intent of communicating unsubstantiated innuendo. Further concluding that it was proper for the Commonwealth to impeach the defendant based on his omission to the police and that the prosecutor's closing argument did not contain misstatements of fact or law resulting in a substantial risk of a miscarriage of justice, we affirm.

1. Cross-examination of the defendant. "[I]t is error for a prosecutor to communicate impressions by innuendo through patterned and leading questions with no demonstrated evidentiary

or good faith basis, which are crafted to evoke negative and prejudicial answers leaving nothing more or less than the unsubstantiated innuendo." Commonwealth v. Wynter, 55 Mass. App. Ct. 337, 337 (2002). "Where an examiner on cross-examination suggests new facts in an effort to impeach a witness, the examiner should be required to represent that he has a reasonable basis for the suggestion, and also to be prepared with proof if the witness does not acquiesce." Commonwealth v. Peck, 86 Mass. App. Ct. 34, 43 (2014), quoting Commonwealth v. Delrio, 22 Mass. App. Ct. 712, 721 (1986).

Here, the prosecutor did not communicate impressions by innuendo. The defendant's primary argument at trial was that he acted in self-defense. The defendant testified that the victim threw the first punch and the defendant "hit [the victim] in self-defense." The police report, however, indicated that the defendant told the police that "nothing happened" and that it was only an argument. Accordingly, it was reasonable for the prosecutor to question whether the defendant had ever asserted that he acted in self-defense before trial. Contrast Wynter, 55 Mass. App. Ct. at 339 (questions with no evidentiary origin that were designed to elicit negative responses and leave echo of questions in air were improper).

On cross-examination, the defendant testified that he told the police what happened as soon as he opened the door. The

prosecutor then attempted to elicit that the defendant told the police that nothing happened. Although the defendant denied saying this, he acknowledged that he had no memory of telling the police that the victim hit him. The defendant also stated that he had never had "discussions with anyone about [the victim's] hitting [him]." Far from relying on innuendo communicated by negative responses, the prosecutor successfully elicited the relevant substance of the defendant's statement to the police. The prosecutor did not "smear the witness by insinuation." Id. at 341, quoting Delrio, 22 Mass. App. Ct. at 721. Contrast Peck, 86 Mass. App. Ct. at 38 n.8, 39-40 (asking five leading questions about statements purportedly made by defendant, each answered with "[a]bsolutely not," had "the effect of informing the jury of the contents of out-of-court statements allegedly made by the defendant that were not admissible").

To be sure, it was improper for the prosecutor to attempt to elicit the contents of the inadmissible police report. Cf. Commonwealth v. Christian, 430 Mass. 552, 559-561 (2000) (error to permit prosecutor to cross-examine defendant at length about specific conversation with witness who was available but not called to testify). The defendant, however, did not answer those questions because the trial judge immediately sustained defense counsel's objections. Accordingly, the jury were left

with the defendant's testimony that he did not tell the police the victim hit him and were not inundated with innuendo.

2. Prior consistent statement. "Prior consistent statements are 'generally inadmissible to corroborate in-court testimony or a witness's credibility.'" Commonwealth v. Lessieur, 472 Mass. 317, 323 (2015), quoting Commonwealth v. Saarela, 376 Mass. 720, 722 (1978). "[A]n exception exists where a trial judge makes a preliminary finding (1) that the witness's in-court testimony is claimed to be the result of a recent fabrication or contrivance, improper influence or motive, or bias; and (2) that the prior consistent statement was made before the witness had a motive to fabricate, before the improper influence or motive arose, or before the occurrence of the event indicating a bias." Commonwealth v. Caruso, 476 Mass. 275, 284 (2017). Here, the judge made no such findings on the record, nor does the record support that such findings could be implicit in the judge's decision. See id. "[T]he admission or exclusion of such testimony rests largely in the discretion of the trial [judge]." Lessieur, supra, quoting Commonwealth v. Tucker, 189 Mass. 457, 485 (1905).

The trial judge acted within his discretion in precluding defense counsel from rehabilitating the defendant with a prior consistent statement regarding self-defense that the defendant may have made to his attorney during trial preparation. The

defendant's statements to his attorney were made after he had already been charged with the crime and was preparing for trial, "after the motive to fabricate arose." Commonwealth v. Tennison, 440 Mass. 553, 563 (2003). Contrast Caruso, 476 Mass. at 285 (rehabilitation proper where witness's prior statement "predate[d] the specific event allegedly giving rise to the event that had an impact on [witness's] testimony"); Commonwealth v. Novo, 449 Mass. 84, 94 (2007) (consistent statement made prior to witness being charged was admissible).

3. Impeachment by omission. The defendant's contention that the prosecutor improperly impeached the defendant with his omission of his self-defense claim in his statements to the police is unavailing. "This was not a case in which the defendant was confronted with his prearrest silence." Commonwealth v. Niemic, 472 Mass. 665, 672 (2015). Here, the defendant engaged in a conversation with the police when they arrived at the apartment complex. Accordingly, the defendant's omission of his self-defense claim at that time cannot be considered prearrest silence. The prosecutor properly "confront[ed] the defendant with his prearrest statements, and impeach[ed] him with inconsistencies between those statements and his trial testimony." Id. Moreover, if the defendant had intentionally omitted mentioning that the victim was the first

aggressor to the police, his reasons for doing so could have been explained on redirect examination.¹

4. Closing argument. Because the defendant failed to establish that he objected to the closing argument,² we review to determine whether there was error, and if so, whether the error created a substantial risk of a miscarriage of justice. See Commonwealth v. Steed, 95 Mass. App. Ct. 463, 470 (2019). Here, the prosecutor misstated neither the law nor the facts in her closing argument. The prosecutor appropriately told the jury that the judge would "tell [them] how to determine whether self-defense is warranted or whether the defendant did act in self-defense." The prosecutor's statement that "[t]here was no need [for the defendant] to defend himself from someone standing in a

¹ We note that the prosecutor's question on cross-examination, "Today is the first time that you're telling anyone that [the victim] hit you, isn't it?" may have improperly elicited testimony regarding the defendant's postarrest silence by being broad enough to extend beyond the prearrest conversation to the absence of a postarrest statement. Because the defendant did not raise this issue at trial or on appeal, however, it is not before us.

² The transcript reflects no objection to the prosecutor's closing argument. Although the defendant presents us with trial counsel's notes suggesting some objections to the closing, these notes are not part of the record on appeal. See Mass. R. A. P. 8 (a), as amended, 378 Mass. 932 (1979). If the defendant wished to modify or correct the record on appeal, it was his duty to do so in accordance with Mass. R. A. P. 8 (e), as amended, 378 Mass. 932 (1979). See Scheuer v. Mahoney, 80 Mass. App. Ct. 704, 708 (2011), quoting Spivey v. Neitlich, 59 Mass. App. Ct. 742, 744 (2003) ("the burden was on the defendant, as appellant, to pursue his appeal, and to provide an adequate record for his appeal").

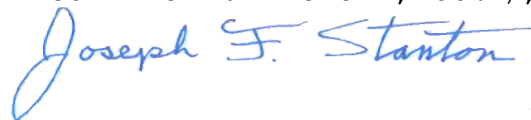
doorway" and, "even if there was, punching [the victim] in the face was not an appropriate response" was not a misstatement of law. Rather, the prosecutor urged the jury to make the logical inference, based on the testimony the Commonwealth presented, that the defendant's punch did not constitute self-defense. See Commonwealth v. Beaudry, 445 Mass. 577, 587 (2005). Similarly, the prosecutor was entitled to argue that the victim's bruise was evidence that contradicted the defendant's theory of self-defense. See Commonwealth v. Bannister, 94 Mass. App. Ct. 815, 825 (2019), quoting Commonwealth v. Lyons, 426 Mass. 466, 472 (1998) ("The prosecutor may argue inferences from the evidence favorable to his case"). Moreover, in his preliminary jury instructions, the judge told the jury that they would "hear instructions from [him] as far as the law is concerned" and that they must "apply the law as [he] give[s] it to [them]." See Commonwealth v. Jefferson, 461 Mass. 821, 835 (2012) (judge's preliminary instructions and final instructions considered together).

Similarly, the prosecutor did not misstate the evidence when she argued that, when the defendant testified, he "didn't even remember what he said to the police." A prosecutor may not "misstate the evidence or refer to facts not in evidence," but is entitled to argue for reasonable inferences based on evidence. Commonwealth v. Imbert, 479 Mass. 575, 585 (2018),

quoting Commonwealth v. Kozec, 399 Mass. 514, 516 (1987). The defendant testified that he did not remember telling the police that the victim had hit him or that his ear hurt. Accordingly, it was reasonable for the prosecutor to argue that the defendant did not remember what he said to the police.

Judgment affirmed.

By the Court (Green, C.J.,
Sullivan & Ditkoff, JJ.³),



Clerk

Entered: August 9, 2019.

³ The panelists are listed in order of seniority.